BANK SIMPANAN NASIONAL

v.

CYBER BUSINESS SOLUTIONS SDN BHD; ELSAG DATAMAT SPA (THIRD PARTY)

HIGH COURT MALAYA, KUALA LUMPUR
HAMID SULTAN ABU BACKER J
[SUIT NO: D-22NCC-279-2009]
4 JUNE 2010

ARBITRATION: *Procedure - Jurisdiction of High Court - Reference of dispute - Dispute in agreement between parties - No arbitration clause - Power of High Court to order matter or question or issue of fact arising therein to be tried before special referee or arbitrator - Whether consent of parties necessary - Circumstances when such power exercisable - Matters involving mixed questions of law and fact - Matters involving complex issues - Matters requiring prolonged examination of documents or scientific investigation - Construction of s. 24A of the Courts of Judicature Act 1964 - Whether s. 24A(2)(a), (b) and (c) of the Courts of Judicature Act 1964 to be read conjunctively or disjunctively - Whether procedure under repealed Arbitration Act 1952 remained applicable under s. 24A(4) of the Courts of Judicature Act 1964 - Courts of Judicature Act 1964, s. 24A*

CIVIL PROCEDURE: *Procedure - Jurisdiction of High Court - Reference of dispute - Dispute in agreement between parties - No arbitration clause - Power of High Court to order matter or question or issue of fact arising therein to be tried before special referee or arbitrator - Whether consent of parties necessary - Circumstances when such power exercisable - Matters involving mixed questions of law and fact - Matters involving complex issues - Matters requiring prolonged examination of documents or scientific investigation - Construction of s. 24A of the Courts of Judicature Act 1964 - Whether s. 24A(2)(a),(b) and (c) to be read conjunctively or disjunctively - Whether procedure under repealed Arbitration Act 1952 remained applicable under s. 24A(4) of the Courts of Judicature Act 1964 - Courts of Judicature Act 1964, s. 24A*

STATUTORY INTERPRETATION: *Construction of statutes - Conjunctive or disjunctive - Purposive approach - Construction of s. 24A of the Courts of Judicature Act 1964 - Whether s. 24A(2)(a), (b) and (c) to be read conjunctively or disjunctively - Whether consent of parties necessary before High Court refers the whole cause or any question or issue of fact arising therein to be tried by special referee or arbitrator - Courts of Judicature Act 1964, s. 24A*

The defendant entered into an agreement with the plaintiff to develop, install and integrate hardware and software to replace the plaintiff's loan management system. The agreement did not provide for an arbitration clause. Both parties entered into a dispute leading the plaintiff to file an action and the defendant to file a counterclaim. The defendant applied to the High Court to refer the matter to arbitration pursuant to s. 24A of the Courts of Judicature Act 1964 ('CJA 1964'). The plaintiff objected to the application. The issue before the High Court mainly concerned the construction of s. 24A of the CJA 1964.

Held (allowing the defendant's application):

(1) Section 24A of the CJA 1964 does not stand as a barrier to the promotion of Alternative Dispute Resolution (ADR). In fact, it encourages ADR in the best interests of justice. (para 7)

(2) Sections 13 and 14 of the UK Arbitration Act 1889 are similar to s. 15 of the Malaysian Arbitration Ordinance 1950, which was repealed and imported 'lock, stock and barrel' into the CJA 1964 through insertion of s. 24A. However when the section was imported, the word 'or' in s. 24A(2)(a) was inadvertently dropped. This resulted in a reading that the consent of the parties is necessary for the appointment of a special referee or arbitrator for the whole cause or matter or any question or issue of fact arising therein to be tried by such referee or arbitrator. A proper analysis of s. 24A of the CJA 1964, shows that s. 24A(2)(a),(b) and (c) must be read disjunctively failing which the whole part of the provision would become otiose and have no practical significance. Parliament does not enact in vain and the courts are duty bound to give a purposive interpretation within the spirit and intent of the Act. (para 7)

(3) The word 'if' in s. 24A(2)(a),(b) and (c) shows that the paragraphs have to be read disjunctively. (para 7)

(4) Section 24A of the CJA 1964 does not prohibit the court from delegating its role to a special referee, arbitrator or an officer of court or prevent consenting parties to refer the matter to arbitration when read disjunctively. If the power is exercised under s. 24A(1) the court must frame the question and the court still has the final say. However, if the power is exercised under s. 24A(2) the court's role is very limited as the report or

award of any special referee or arbitrator will stand as a decree, judgment or order of court, unless set aside. The scheme of s. 24A of the CJA 1964 is such that the final decision maker is the court on the report or award. Consequently the court's role is never abdicated in respect of the decision making process. The constitutional role of court is thus preserved. (para 7)

(5) If a matter is a mixed question of law and fact, it would be a proper exercise of discretion to preserve the issue of law for the courts and frame the relevant questions relating to the facts to the special referee as provided for in s. 24A(1). Where the issue of law is not complex and is within the competence of the special referee, arbitrator or officer of the court to deal with, complex issues of fact may be referred wholly notwithstanding one party does not agree. An officer of court may mean registrars or even sessions court judges, provided they have the special knowledge or learning to deal with the issues. Complexity of issue means when the judge forms an opinion that justice cannot be done between the parties. A complicate case means one within the spirit and intent stated in s. 24A(2) of the CJA 1964. (para 7)

(6) The instant case involved complex issues of fact requiring scientific investigations into computer software and prolonged examination of documents. The agreement between the plaintiff and defendant ought to have had an arbitration clause, though the absence of such clause could not prevent the court from ordering the matter for arbitration pursuant to s. 24A. (para 8)

(7) Section 24A(4) of the CJA 1964 would still remain applicable notwithstanding the repeal of the Arbitration Act 1952. The court could still rely on the procedural provisions of a repealed Act in a reference. The court could also direct suitable procedural guidelines to be adopted in the absence of specific procedural guidelines. (paras 10 & 11)

Case(s) referred to:

Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors [2003] 1 CLJ 585 CA ***(refd)***

Astor Properties Pty Ltd v. L'Union Des Assurance De Paris NSWLR [1989] 17 483 ***(refd)***

Buckley and Another v. Bennell Design & Construction Pty Ltd [1977-1978] 140 CLR 1 ***(refd)***

A *Chloride Batteries Australia Ltd v. Glendale Chemical Products Pty Ltd NSWLR [1988] 17 60* ***(refd)***
HSBC Bank Malaysia Bhd v. Wong Thien Boon & Ors [2008] 6 CLJ 381 CA ***(refd)***
In Re Questions between WA Humphery and HA Humphrey [1917] 2 KB 72 ***(refd)***
B *Lum Chang Building Contractors Pte Ltd v. Anderson Land Pte Ltd [2000] 1 SLR (R) 648* ***(refd)***
Mayhead v. Hydraulic Hoist Company, Limited [1931] 2 KB 425 ***(refd)***
Nagen Kundu [1934] 61 Cal 4980 ***(refd)***
Rahim Sheik [1925] Cal 872 ***(refd)***
C *Re Humphrey [1917] 2 KB 72* ***(refd)***
Steven Phoa Cheng Loon & Ors v. Highland Properties Sdn Bhd & Ors [2000] 4 CLJ 508 HC ***(refd)***
Taman Bandar Baru Masai Sdn Bhd v. Dindings Corporation Sdn Bhd [2010] 5 CLJ 83 HC ***(refd)***
D *Union Insurance Malaysia Sdn Bhd v. Chan You Young [1999] 3 CLJ 517 CA* ***(refd)***

Legislation referred to:
Arbitration Ordinance 1950, s. 15
Courts of Judicature Act 1964, s. 24A(1), (2)(a), (b), (c), (3), (4)

E Arbitration Act 1889 [UK], ss. 13, 14(a), (b), (c)
Married Women's Property Act 1882 [UK], s. 17

Other source(s) referred to:
Stephen Hibbert, *References Out from Court,* ACLN, Issue 25, p 47

F *For the plaintiff - Vijakumar R Varatharajoo; M/s Albar & Partners*
For the defendant - Conrad Young Wye King; M/s Sreenevasan Young

Reported by Andrew Christopher Simon

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JUDGMENT

Hamid Sultan Abu Backer J:

H **[1]** This is my judgment in respect of the defendant's application encl. 19 to refer the above matter to arbitration pursuant to s. 24A Courts of Judicature Act 1964 (CJA 1964) and the prayer reads as follows:

> (1) the whole cause or matter of the Plaintiff's claim against the
I Defendant and the Defendant's counterclaim against the plaintiff be referred to and tried before an arbitrator agreed on by the parties or failing which an arbitrator appointed by this Honourable Court;

(2) the arbitrator appointed as per item (1) above be deemed to be an officer of this Honourable Court and shall have such authority and shall conduct the reference in such manner as is prescribed by the rules of court and/or as this Honourable Court may direct;

(3) the award of the arbitrator appointed as per item (1) above shall, unless set-aside by this Honourable Court, be equivalent to the decree, judgment or order of this Honourable Court;

(4) the remuneration to be paid to the arbitrator appointed as per item (1) above shall be as agreed with the arbitrator and/or determined by this Honourable Court;

(5) the costs of and occasioned by this application be costs in the cause of the arbitration before the arbitrator appointed as per item (1) above;

(6) such further or other relief be granted as deemed fit and proper by this Honourable Court.

Brief Facts

[2] The dispute is in relation to a project undertaken by the defendant for the development, installation and integration of hardware and software for the plaintiff to replace the existing loan management system. One of the main areas of the dispute is what was or was not included in the defendant's scope of works, which the defendant says is highly technical in nature and has to be dealt through voluminous documentary evidence for the claim as well as the counterclaim. And asserts that it will involve lengthy oral evidence from witnesses and will lead to a prolonged trial which cannot be conveniently conducted by the court through its ordinary officers. The plaintiff's claim is for the sum for more than 6 million with damages, interest etc; and the defendant's counterclaim for more than 4 million, and with damages, etc;. The defendant has also engaged a third party to assist in the project and that agreement has an arbitration clause. The agreement between the plaintiff and the defendant does not have an arbitration clause notwithstanding the obligation to the principal is one and the same in respect of the final outcome.

[3] The plaintiff says: (i) it is not technical or voluminous to warrant the exercise of the discretion of the court pursuant to s. 24A of CJA 1964; (ii) the application is flawed; (iii) technical issues can be dealt by expert evidence; (iv) the reference will delay the trial; (v) plaintiff's do not consent to the application.

[4] Section 24A of the CJA 1964 reads as follows:

(1) The High Court may refer any question arising in any cause or matter, other than a criminal proceeding by the Public Prosecutor, for inquiry or report to any special referee. The report of a special referee may be adopted wholly or partially by the High Court and enforced as a decree, judgment or order to the same effect.

(2) In any cause or matter other than a criminal proceeding by the Public Prosecutor:

(a) if all the parties interested who are not under disability consent;

(b) if the cause or matter requires any prolonged examination of documents or any scientific or local investigation which cannot, in the opinion of the High Court, conveniently be conducted by the Court through its ordinary officers; or

(c) if the question in dispute consists wholly or in part of matters of account, the High Court may at any time order the whole cause or matter or any question or issue of fact arising therein to be tried before a special referee or arbitrator respectively agreed on by the parties or before an officer of the Court.

(3)(a) In all cases of reference to a special referee or arbitrator under an order of the High Court in any cause or matter, the special referee or arbitrator shall be deemed to be an officer of the Court and shall have such authority and shall conduct the reference in such manner as is prescribed by rules of court, and subject thereto as the High Court may direct.

(b) The report or award of any special referee or arbitrator on any such reference shall, unless set aside by the High Court, be equivalent to the decree, judgment or order of the Court.

(c) The remuneration to be paid to any special referee or arbitrator to whom any matter is referred under order of the High Court shall be determined by the Court.

(4) The High Court shall, as to references under order of the Court, have all the powers which are by the Arbitration Act 1952 [Act 93], conferred on the High Court as to references by consent out of Court.

[5] The learned counsel for the plaintiff submits as follows:

(i) The 1st limb of the section only permits to "refer any question arising in any cause or matter." And in consequence the whole matter cannot be referred to.

(ii) The 2nd limb permits "whole cause or matter" as stated in the final paragraph of s. 24A(2) but that paragraph is subject to para (a)(b)(c) of the section which must be read conjunctively. To this the defendant say it must be read disjunctively, as the word 'or' had been inserted. And further asserts that the repetition of the word 'if' at the start of the sub-sections (a)(b) and (c) further indicate that they are to be read disjunctively.

(iii) As the plaintiff does not consent to the application it cannot be referred to the arbitrator.

(iv) In *Re Humphrey* [1917] 2 KB 72, the Court of Appeal appears to suggest that judge cannot delegate his powers to an official referee under a power similar to our s. 24A. To this the learned counsel for the defendant says that case concerned a specific jurisdiction granted to a judge alone by s. 17 of the UK Married Women's Property Act 1882. And asserts that case does not stand for the proposition contended for by the plaintiff and is of no relevance or consequence to this application.

(v) New Zealand and Australia have similar provisions but there are rules of court prescribed for such references. As we do not have such provision under the rules of court, s. 24A cannot be resorted to. To this the learned counsel for the defendant says that s. 24A(3) caters for the rules of court to be applied, much like any other case in court. And relies on the Singapore Court of Appeal decision in *Lum Chang Building Contractors Pte. Ltd. v. Anderson Land Pte. Ltd.* [2000] 1 SLR (R) 648 where it was stated "the arbitrator has really become an extension of the court in making the award."

(vi) In *HSBC Bank Malaysia Bhd v. Wong Thien Boon & Ors* [2008] 6 CLJ 381; the court stated the judge cannot dictate as to how the proceedings are to be conducted. To this the learned counsel for the defendant says the case can be distinguished and has no relevance to the issues relating to s. 24A of CJA 1964.

(vii) Arbitration Act 1952 (AA 1952) has been repealed and in consequence s. 24A(4) will not be applicable.

[6] Parties relied on the following cases namely: *Steven Phoa Cheng Loon & Ors v. Highland Properties Sdn Bhd & Ors* [2000] 4 CLJ 508; *Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors* [2003] 1 CLJ 585; In re Married Women's Property Act 1882, *In Re Questions between W.A. Humphery and H.A. Humphrey* [1917] 2 KB 72; *Astor Properties Pty Ltd v. L'Union Des Assurance De Paris* NSWLR [1989] 17 483; *Chloride Batteries Australia Ltd v. Glendale Chemical Products Pty Ltd* NSWLR [1988] 17 60; *HSBC Bank Malaysia Bhd v. Wong Thien Boon & Ors* [2008] 6 CLJ 381; *Union Insurance Malaysia Sdn Bhd v. Chan You Young* [1999] 3 CLJ 517; *Mayhead v. Hydraulic Hoist Company, Limited* [1931] 2 KB 425; *Lum Chang Building Contractors Pte Ltd v. Anderson Land Pte Ltd* [2000] 1 SLR(R) 648; *Buckley and another v. Bennell Design & Construction Pty. Ltd* [[1977-1978] 140 CLR 1.

[7] I have read the application, affidavits and submissions of the parties in detail. Both the learned counsel have endeavoured to assist the court in the best possible manner within the limited time frame in an area of law and jurisprudence which has not been dealt in detail by our courts. The effect of allowing the defendant's application on merits must be seen to be a boom to Alternative Dispute Resolution (ADR) which is been highly advocated by the judiciary not only in Malaysia but also other countries. In my view s. 24A does not stand as a barrier to promote ADR in the right perspective. In fact it encourages ADR in the best interest of justice. An endorsement of my view by the Apex court will truly open a new chapter for ADR in this country reducing the stress on the court in technical areas which can be dealt with by experts in that field rather than going through expert evidence where much time will be spent. Such saving of time is necessary in public interest as many prisoners are still languishing in jail without a hearing and priority needs to be given to those matters. After having given much consideration to the plaintiff's submission, I take the view that the defendants application must be allowed. My reasons *inter alia* are as follows:

(i) The provision of s. 24A is not something new in the Commonwealth. It was there as early as 19th century. The history of such provision has been well articulated in the New Zealand case of *Astor Properties Pty Ltd v. L'Union Des Assurance De Paris* NSWLR, 1989 p. 483 and the article by Stephen Hibbert, titled *"References Out from Court"* ACLN,

Issue 25, p. 47. Sections 13 and 14, UK Arbitration Act 1889 are worded similarly as our s. 15 of Arbitration Ordinance 1950 (not AA 1952) which was repealed and imported to CJA 1964 by way of insertion as s. 24A. When it was imported the word 'or' in s. 24A(2)(a) went amiss and in consequence the reading of the Act in the first instance will ordinarily mean that the consent of the parties is necessary for the appointment of special referee or arbitrator for the whole cause or matter or any question or issue of fact arising therein to be tried. In consequence it has discouraged litigant to apply under the section when there was objection from the other side. A proper analysis of s. 24A, with its history will show that s. 24A(2)(a),(b) and (c) must be read disjunctively failing which the whole part of the provision will become more or less otiose and will have no practical significance. It must be remembered that parliament does not enact in vain. And courts are duty bound to give a purposive interpretation within the spirit and intent of the Act.

(ii) Section 13 UK Arbitration Act 1889 reads as follows:

> 13 (1) Subject to Rules of Court and to any right to have particular cases tried by a jury, the court or a judge may refer any question arising in any cause or matter) other than a criminal proceeding by the crown) for inquiry or report to any official or special referee.
>
> (2) The report of an official or special referee may be adopted wholly or partially by the Court or a judge, and if so adopted may be enforced as a judgment or order to the same effect.

Section 14 reads as follows:

> 14. In any cause or matter (other than a criminal proceedings by the Crown):
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> (a) If all the parties interested who are not under disability consent; or
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> (b) If the cause or matter requires any prolonged examination of documents or any scientific or local investigation which cannot in the opinion of the Court or a judge conveniently be made before a jury or conducted by the Court through its other ordinary officers; or

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> (c) If the question in dispute consists wholly or in part of matters of account;
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> the Court or a judge may at any time order the whole cause or matter, or any question or issue of fact arising therein, to be tried before a special referee or arbitrator respectively agreed on by the parties, or before an official referee or officer of the court.

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It must be noted that s. 14(a), (b) and (c) has the word 'or' in consequence it was treated as disjunctive and court in exercise of the provision had little doubt in referring matter to special referee or arbitrator as of right provided the necessary criteria is satisfied even if one party objects. Support for the proposition is found in a number of cases in the Commonwealth. In *Mayhead v. Hydraulic Hoist Company Limited* [1931] 2 KB 424, at p. 430 Scrutton LJ went to the extent of saying as follows:

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> In my view the judge cannot be compelled to try a complicated case in a way in which in his opinion, reasonable exercised, justice cannot be done between the parties. His order will be a discretionary order, but, as shown by the case of *Ormerod v. Todmorden Mill Co.* (1), will be appealable if there are no reasonable grounds for his discretion.

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(iii) As I said earlier, s. 24A was a direct import of s. 15 of Arbitration Ordinance. And this statement has been set out in Explanatory Statement to the Amendment of Courts of Judicature Act 1964, when it was tabled on 1 November 1972. And the relevant Explanatory Statement reads as follows:

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> Clause 13 and 14 reproduce sections 14 to 18 of the Arbitration Ordinance, 1950, relating to powers of the High Court in making references to special referees. These provisions belong more properly to the Courts of Judicature Act than to the Arbitration Ordinance.

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In addition a reference to the Hansard will show s. 15 of the Arbitration Ordinance was imported to CJA 1964, in crude terms, "lock, stock and barrel". The Minister when moving the bill as per the Hansard report had stated as follows:

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> Clause 9, Sir, transfers to the Act the provisions relating to the immunity of judges contained in the Courts Ordinance 1948; and Clause 13 and 14 transfer to the Act the provisions relating to the powers of the High Court and the Federal Court in making references to special referees contained in the Arbitration Ordinance, No. 12 of 1950. A special referee is a person to whom questions are referred by the court for inquiry and report. These provisions belong more properly to the Courts of Judicature Act than to the two Ordinances mentioned.

It must be said here as per Arbitration Ordinance the 'or' was found in (a), (b) and (c) of the impugned section making it clear that it has to be read disjunctively. With the omission of 'or' in s. 24A(2)(a) it gives room to say that (a), (b) and (c) has to be read conjunctively. And if so it will have been a substantial amendment and the explanatory statement of the Minister will have highlighted the change. This was not done in this case and the only conclusion is that our parliamentary draftsman by over sight has omitted to include the word 'or'.

(iv) Notwithstanding the omission of 'or' in s. 24A(2)(a), (b) and (c) starts with the word 'if' and the learned counsel says the word 'if' in all the paragraphs will show that it has to be read disjunctively. I agree with the said submission. Construing otherwise will in fact make the sub-paragraphs sterile if there is no consent by the parties. The background history will show parliament did not intend to do so. In *Taman Bandar Baru Masai Sdn Bhd v. Dindings Corporation Sdn Bhd* [2010] 5 CLJ 83 in a similar situation on different facts where the draftsman had committed an error I had made the following observation:

> [8] In the instant case, the final award was made pursuant to AA 2005. The plaintiff's argument that the AA 1952 ought to apply is based on the case of *Putrajaya Holdings (supra)* where the court relied on the Bahasa Malaysia text. However, the court did acknowledge that for the purpose of AA 2005 the authoritative text was the English text, but gave effect to the Bahasa Malaysia version which was absent in the English text and that is the words 'Perjanjian Timbangtara dibuat'. It is trite that interpreting an Act of Parliament, the intention of the legislature must be taken into account. That does not necessarily mean a

wrong version of a translation must be given effect. First and foremost it must be remembered that Act 2005 *per se* is not a product of our Parliamentary Draftsmen. The Act 2005 has an international origin and was adopted in Malaysia. And similar Act has come into force in various countries. It is quite obvious that Parliament must have intended for the English version of the Act to apply and not the erroneous version accidentally inserted by our draftsmen. If the erroneous version is adopted it is quiet likely the courts for a long time have to deal with AA 1952 and that could not have been the intention of Parliament for introducing AA 2005. In addition, Parliament had deemed the English text as being authoritative and the Bahasa Malaysia version is rendered as a translation only. Support for the proposition is found in (i) s. 6 of the National Language Act 1963/1967; (ii) Prescription under s. 6 of the National Language Act 1963/1967; (iii) PU 33/68, s. 3 of the Delegation of Powers Act 1956.

[9] Section 6 states as follows:

6. Authoritative text of laws

The texts:

(a) of all Bills to be introduced or amendments thereto to be moved in Parliament or the legislative assembly of any State;

(b) of all acts of Parliament and all subsidiary legislation issued by the Federal Government;

(c) of all Enactments and subsidiary legislation issued by any State Government; and

(d) of all Ordinances promulgated by the Yang di-Pertuan Agong,

shall be in the national language and in the English language, the former being authoritative unless the Yang di-Pertuan Agong otherwise prescribes generally or in respect of any particular law or class of laws.

[10] Gazette dated 9 March 2006 reads as follows:

in exercise of the powers conferred on the yang di-Pertuan Agong by section 6 of the National Language Acts 1963/67 (Act 32) and delegated to the Prime Minister under P.U. 33/

68, the Prime Minister prescribes that the authoritative text of the Arbitration Act 2005 (Act 646) and any subsidiary legislation made under it is the text in the English Language.

[see (i) *Rosenizam Maharam v. PP* [2002] 1 LNS 260 HC; (ii) *Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143 FC].

[11] Further, Hansard report dated 7 December 2005, captures what the Minister said in Parliament in respect of s. 51 of AA 2005 and it reads as follows:

Fasal 51 memperuntukkan mengenai pemansuhan Akta Timbang Tara 1952 dan Akta Kovensyen Mengenai pengiktirafan dan Penguatkuasaan Award Timbang Tara Asing 1985 serta peruntukan kecualian.

Akta ini tidak terpakai kepada prosiding timbang tara yang telah dimulakan sebelum permulaan kuat kuasa akta ini. Walaubagaimanapun, akta ini akan terpakai kepada perjanjian timbang tara yang dibuat sebelum permulaan kuat kuasa akta ini di mana prosiding timbang tara yang dimulakan lagi.

[12] There are number of authorities which say that it is permissible for the court to resort to the Hansard as an aid to interpretation of the legislation (see *Chor Phaik Har v. Farlim Properties Sdn Bhd* [1994] 4 CLJ 285 FC; (ii) *DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v. Dikim Holdings Sdn Bhd & Anor* [2002] 2 CLJ 57 FC).

(v) In my view s. 24A in essence does not prohibit the court from delegating its role to a special referee or arbitrator or officer of court or prevent consenting parties to refer the matter to arbitration when read disjunctively. Why should parliament stop consenting parties from referring the matter to arbitration? I find no reason and in consequence the argument that it was always meant to read disjunctively has merits. If the power is exercised under s. 24A(1) the court must frame the question and the court still has the final say. However, if the power is exercised under s. 24A(2) the courts role is very limited as the report or award of any special referee or arbitrator will stand as a decree, judgment or order of court, unless set aside. The Singapore Court of Appeal in *Lum Chang Building (supra)* in dealing with its own provision on the facts of the case made the following observation:

A When a court, pursuant to s. 22, decides to refer an entire cause to arbitration, the court has, in effect, relinquished its functions to the arbitrator, whom the court must have thought is better placed to decide the cause. The arbitrator has really become an extension of the court in making the award.

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(vi) It must be asserted that the scheme of s. 24A is such that the final decision maker is the court on the report or award and in consequence the courts role is never abdicated in respect of the decision making process. Under s. 24A the final
C arbiter to say what is right and wrong is the court and in that aspect the constitutional role of court is preserved.

(vii) The real issue *inter alia* before the matter can be referred to will actually depend on the complexity in respect of facts in
D issue and cannot be one of law. If it is a mixed question of law and facts, it will be a proper exercise of discretion to preserve the issue of law for the courts determination and frame the relevant questions relating to the facts to the special referee as provided for in s. 24A(1). However, where
E the issue of law is not complex and will be within the competence of the special referee or arbitrator or officer of court to deal with the complex issues of fact may be referred wholly notwithstanding one party does not agree. Officer of court may even mean registrars or even to sessions court
F judges etc; provided they have the special knowledge or learning to deal with the issues.

(viii) Complexity of issue must necessarily mean; when the judge forms an opinion that justice cannot be done between the
G parties as enunciated by Scrutton LJ in the above case. And a complicated case necessarily must mean to be within the spirit and intent of what is stated in (b) and/or (c) of s. 24A(2).

[8] In the instant case I am satisfied after having perused the
H pleadings and affidavits, the issues involve scientific investigations relating to computer, software's etc; and prolonged examination of documents is necessary to determine the breach. Though I agree with the plaintiff's that the issue of law is related to breach of contract but before arriving at the decision one have to deal with
I the complex issues stated above before arriving at a just decision. In

the instant case the claim by the plaintiff's runs into millions and is matched by the counterclaim of the defendant. In addition the defendant attempted to a drag third party an Italian company who were involved in the project with the defendant but on the application of the 3rd party on the grounds there is an arbitration clause between the defendant and 3rd party, I refused the 3rd party to be made a third party in the action and ruled that the dispute between the defendant and 3rd party ought to be dealt with by way of arbitration. In fact the agreement between the plaintiff and the defendant ought to have an arbitration clause. That does not mean the court cannot order the matter for arbitration pursuant to s. 24A.

[9] The other issue the plaintiff raised is that there is no ample provision for rules of procedure for arbitration unlike other countries. I do not think there is much merit in the argument as s. 24A(3) is wide enough to cater for rules.

[10] In addition the plaintiff also says that s. 24A(4) will be no more applicable as Arbitration Act 1952 (AA 1952) has been repealed. AA 1952 applies to private arbitration only and that has been repealed. That does not necessarily mean the court cannot rely on its procedural provisions of a repealed Act, in relation to reference by court. Absence of specific procedural guidelines does not mean the court cannot direct suitable procedural guidelines to be adopted (see *Rahim Sheik* [1925] Cal. 872; *Nagen Kundu* [1934] 61 Cal. 4980).

[11] Section 24A(4) of CJA 1964 stands as a model in reference cases. Even if it is repealed does not necessarily mean the 'model' cannot be utilized to regulate the proceedings in reference cases. And I do not see how it will prejudice any parties to the proceedings.

[12] In *Buckley and Another v. Bennell Design & Constructions Pty. Ltd* [1977-1978] 140 CLR 1 the court when dealing with a reference procedure similar to our s. 24A, Stephen J adopting the words of Quintin Hogg (later Lord Hailsham) made of the following observation:

> … As Mr. Quintin Hogg, as he then was, said in Law of Arbitration (1936), p. 193, such reference 'is a species of trial, and the decision is now equivalent to a form of judgment or verdict and not an award.' In such a reference the court's procedures of adjudication are not abandoned in favour of extra-curial settlement of dispute by

A arbitration. Instead the court directs that, for the better resolution of the particular proceedings initiated before it, resort should be had to this special mode of trial which the legislation has made available.

B **[13]** For reason stated above I allow encl. 19 as prayed, with no order as to costs, with liberty to apply for any direction as may be deemed necessary.

I hereby order so.

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